

71691-3

71691-3

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

Jeffrey HALEY,
Counterclaimant & Appellant

v.

MJD Properties LLC
Counter-Defendant & Respondent

No. 71691-3-1

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APPELLANT
MJD PROPERTIES LLC
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A. NUISANCE FROM EXCESSIVE LIGHT

**Granting the relief requested by Haley would not
impose a detriment on Pugh.**

Pugh/MJD argues that this court should affirm the dismissal of this claim on summary judgment because nuisance law cannot confer a benefit on the complaining neighbor if it would impose a detriment on the defending neighbor. This argument is not relevant. If the relief requested by Haley is granted, it would not impose a detriment on Pugh.

Because this issue was decided by the court below on MJD’s motion for summary judgment, the Court of Appeals must accept the facts as Haley presented them by declaration or as established in the record below. The court may not rely on inconsistent allegations of fact by MJD. In particular, the court must accept that:

- (3) there is no benefit to MJD’s property from the excessive light and there would be no detriment if abatement is ordered.

As stated in the record and in Haley’s brief, the reason there would be no detriment to Pugh’s property from adjusting the light shield to block light from entering Haley’s bedroom window is because light would still be cast onto Pugh’s driveway and to at least eleven feet above all parts of Pugh’s driveway. CP 59. There is no benefit to Pugh’s property from casting light to higher than eleven feet above his driveway.

1 **Adjusting outdoor lighting to shine light where it is useful and not**
2 **where it creates glare is valuable for people everywhere.**

3 One of the problems addressed by the International Dark-Sky
4 Association (IDA) is described this way:

5 “Your neighbors have installed a new light on their property.
6 It is an unshielded fixture that casts a bright light with no control and
7 lots of glare. . . . Their new fixture is lighting up your yard or
8 shining into your home, maybe even illuminating your bedroom and
9 disrupting your sleep. Your neighbors cite safety as the reason for
10 installing this light. The illumination gives them a newfound “feeling
11 of security.”

12 What your neighbor may not know is that unshielded fixtures
13 that create glare and splatter light everywhere may make a property
14 less safe by not focusing the light where it is needed. Likewise, your
15 neighbor also may not be aware of how you are affected by the light
16 trespass coming off the property.”

17 www.darksky.org/PG3-residential-lighting.pdf The IDA asserts:

18 “Using shielded fixtures is beneficial in two ways. First, glare
19 is decreased or eliminated. Uncomfortable or temporarily blinding, a
20 glaring light can distract the eye and cast harsh shadows that create
21 easy concealment opportunities for a trespasser. Second, shielded

1 fixtures help you control both the placement and the amount of light.
2 Entrances, windows, and gates can be the focal points of a lighting
3 scheme that does not over illuminate, but allows adequate and
4 uniform visibility that dissipates shadows.

5 People can see more in soft lighting than they can in spotlights
6 because they can see beyond the point of illumination.”

7 www.darksky.org/PG3-residential-lighting.pdf

8 There is no Washington court opinion which suggests that casting
9 excessive light with no benefit to the property casting the light cannot be a
10 nuisance, and Pugh has cited no such opinions from any other jurisdiction.

11 The court should remand with directions to allow this nuisance claim
12 to be decided on the merits.

13 **B. LIVE TREE AS A SPITE STRUCTURE**

14 **Under Washington court opinions, a newly planted large tree**
15 **can be a spite structure.**

16 Although there is no precedential published opinion of the courts of
17 the State of Washington that decides whether a live tree can be a spite
18 structure, there is an unpublished opinion that, while not controlling
19 precedent, is nevertheless instructive. In a decision of Division One of the
20 Court of Appeals issued July 28, 2014, Judge Spearman wrote:

1 “Respondents contend that [under *Karasek v. Peier*, 22 Wash. 419
2 (1900)] a configuration of trees cannot be a structure. We disagree.
3 First, the *Karasek* court did not consider the question presented here,
4 i.e., whether an artificial configuration of trees could constitute a
5 "structure" under the statute. And second, we do not read the cited
6 definition as excluding a fence-like structure made of living instead of
7 artificial parts. . . . Thus, no distinction is drawn between structures
8 consisting of natural versus man-made or artificial parts.

9 Additionally, since *Karasek*, this court has concluded that a
10 row of trees planted along a property line might be legally equivalent
11 to a fence or wall. In *Lakes at Mercer Island Homeowners Ass'n v.*
12 *Witrak*. 61 Wn. App. 177, 181-82, 810 P.2d 27 (1991), we determined
13 that whether a row of trees planted along a property line constituted a
14 fence was a question for the fact finder. Although we did not
15 consider the spite structure statute in *Lakes*, our reasoning—if a row
16 of trees looks and acts like a fence, then courts can treat it like a
17 fence—is instructive here.

18 We conclude that when in artificially arranged configurations,
19 trees can form a "structure," as that term is used in RCW 7.40.030.

1 **There is no exception to the spite structure statute for erection of**
2 **a tall tree where it is a replacement for a small tree.**

3 Pugh argues that, as a matter of law, the planting of this 18 feet tall
4 cedar tree cannot constitute the erection of a spite structure because he
5 merely replaced a small tree that was already there when he bought the
6 property and his motive to select a particular type and size of tree for the
7 replacement is therefore irrelevant.

8 However, the tree that was there when Pugh bought the property was
9 not tall enough to block Haley's view and likely would not block Haley's
10 view in the future because it was a weeping-style tree that typically grows
11 downward as much as upward. CP 98 3rd¶. Pugh could have replaced the
12 tree that was on the property when he bought it with a similar tree that would
13 have remained short enough and/or thin enough to not seriously block Haley's
14 view. As this matter is presented on appeal from a summary dismissal, the
15 court must accept Haley's allegation that "Any typical person would find
16 such a tree to be just as aesthetic for decorating Pugh's lot as the tree selected
17 by Pugh." CP 60.

18 This court should rule that, under Washington law, if, for reasons of
19 spite or malice, a property owner replaces a small tree that will likely never
20 grow large with an 18 foot native cedar, 3 feet from the property line, directly
21 in front of the primary view window of his neighbor eight feet away, this can
22 be a violation of the spite structure statute.

1 **The fact that Haley had trimmed the formerly present small tree**
2 **before Pugh bought the property**
3 **does not create an exception to the spite structure statute.**

4 Four months before Pugh/MJD bought the property, Haley trimmed
5 the small tree that Pugh later replaced with a tall cedar. Haley claimed that
6 the former owner of the property had given him permission to do so. The
7 former owner of the property never asserted that Haley did not have adequate
8 permission to trim the tree until nine months after the trimming, five months
9 after Pugh bought the property. Five months after he bought the property,
10 Pugh went back to the former owner and acquired the former owner's claim
11 against Haley for trimming the tree without legally adequate permission.

12 Because this issue was decided by the court below on MJD's motion
13 for summary judgment, the Court of Appeals must accept the facts as Haley
14 presented them by declaration or as established in the record below. The
15 court may not rely on inconsistent allegations of fact by MJD.

16 There was no finding below that Haley's trimming of the tree
17 "butchered" the tree or "destroyed" the tree or removed "ten feet" off the
18 height of the tree. The trimming did not occur "on MJD property". These
19 are allegations by Pugh/MJD in its brief that must be rejected by this court
20 because the decision below was on summary judgment and these allegations
21 were not established below.

22 Pugh claims that, as a matter of law, because Haley trimmed the tree
23 without legally adequate permission four months before Pugh purchased the
24 property, this creates an exception to the spite structure statute so that Pugh
25 can, out of malice and spite, replace the trimmed tree with a much taller

1 native cedar that will grow to be huge. There is no language in the statute or
2 in any court opinion that supports such an exception to the statute.

3 **There is no exception to the spite structure statute for**
4 **erection of a single tall and wide tree.**

5 Pugh argues that a single tall and wide tree, in contrast to a
6 configuration of multiple parts, cannot constitute a spite structure.
7 RCW 7.40.030 provides:

8 An injunction may be granted to restrain the malicious erection, by
9 any owner or lessee of land, of any structure intended to spite, injure
10 or annoy an adjoining proprietor.

11 (emphasis added) There is no language in this statute which requires that the
12 structure extend linearly rather than being round or cylindrical or conical.

13 There is no language in this statute which requires that the structure be
14 comprised of parts affixed together by man rather than a set of parts
15 assembled by nature. And there is no reason in any court opinion to impose
16 such a construction on the statute.

17 Dictionary.com defines “structure” as:

18 “something built or constructed, as a building, bridge, or dam.”

19 <http://dictionary.reference.com/browse/structure> Certainly, something built
20 or constructed or erected can be cylindrical or round or conical.

1 **On this appeal, the court must accept that the actions were motivated by**
2 **malice or spite, and the record below did not establish that the**
3 **replacement tree is “really useful” or “reasonable”.**

4 Pugh argues that, if the erected 18 foot tall cedar tree is “useful” or
5 “enhances the enjoyment of one’s land”, then it cannot be a spite structure.
6 There is no such exception in the statute, but a similar interpretation of the
7 statute was applied in *Baillargeon et al., v. Press*, 11 Wn. App. 59, 66; 521
8 P.2d 746, where the court stated:

9 in order to apply the spite fence statute, [sic. – the word “fence” is not
10 in the statute] RCW 7.40.030, to restrain the erection of a fence or
11 other structure or to abate an existing structure, the court must find

12 (1) that the structure damages the adjoining landowner's
13 enjoyment of his property in some significant degree;

14 (2) that the structure is designed as the result of malice or
15 spitefulness primarily or solely to injure and annoy the adjoining
16 landowner; and

17 (3) that the structure serves no really useful or reasonable
18 purpose.

19 [emphasis added] The statute is focused on motivation. If a particular
20 structure is erected out of malice or spite and it harms neighboring property,
21 in contrast to an alternative structure that would be equally “useful” or would
22 equally “enhance the enjoyment of one’s land” but causes no harm to the

1 MJD argues that only one party is entitled to an award of costs and
2 fees and it is the party that receives the larger award.

3 This is not a case where the claims of each party – claim and
4 counterclaim – were related to each other. Under CR 13(a), the counterclaim
5 was not a compulsory counterclaim because it did not arise “out of the
6 transaction or occurrence that is the subject matter of the opposing party's
7 claim”. It was a permissive counterclaim under CR 13(b). It could have
8 been brought in a separate proceeding. Consequently, the analysis of which
9 party prevailed on each claim should be independent of the outcome on the
10 other claim.

11 **Haley is entitled to an award of attorney fees because**
12 **he made a settlement offer that complied with RCW 4.84.280**
13 **and was smaller than his award.**

14 RCW 4.84.250 provides:

15 Notwithstanding any other provisions of chapter 4.84 RCW
16 and RCW 12.20.060, in any action for damages where the amount
17 pleaded by the prevailing party as hereinafter defined, exclusive of
18 costs, is seven thousand five hundred dollars or less, there shall be
19 taxed and allowed to the prevailing party as a part of the costs of the
20 action a reasonable amount to be fixed by the court as attorneys' fees.

1 After July 1, 1985, the maximum amount of the pleading under this
2 section shall be ten thousand dollars. (emphasis added)

3 RCW 4.84.280 provides:

4 Offers of settlement shall be served on the adverse party in the
5 manner prescribed by applicable court rules at least ten days prior to
6 trial. Offers of settlement shall not be served until thirty days after
7 the completion of the service and filing of the summons and
8 complaint. Offers of settlement shall not be filed or communicated to
9 the trier of the fact until after judgment, at which time a copy of said
10 offer of settlement shall be filed for the purposes of determining
11 attorneys' fees as set forth in RCW 4.84.250.

12 The following facts of record show that Haley made a settlement offer that
13 complies with RCW 4.84.250 and 280.

14 In Haley's counterclaim, he stated the following request for relief:
15 "Defendant requests an award of damages, costs and fees under any provision
16 of law or court rules that may be applicable." CP 7.

17 The cultivated plant that was removed belonged to Haley's wife,
18 Carol Glass, who contributed it to community property. MJD took her
19 deposition on February 27, 2013. In that deposition, she testified that the
20 plant was a columbine that she planted, which limited the possible damages
21 to far less than \$10,000. CP 179.

1 MJD provided an expert's report that concluded the columbine was
2 worth \$39.75. On July 22, 2013, more than 4 months before trial
3 (arbitration), Haley filed and served on MJD a pleading stating a motion for
4 summary judgment on Haley's claim for trespass. On page 10 of Haley's
5 pleading wherein he asked for a judgment, Haley stated: "My wife and I
6 accept the figure of \$39.75" as the amount of the requested judgment. CP
7 184. Service of this pleading complies with RCW 4.84.280. This pleading
8 was not provided to the arbitrator who was the trier of fact as required by
9 RCW 4.84.280.

10 On July 31, 2013, more than 4 months before trial (arbitration), Haley
11 presented to the court and served on MJD a proposed order of summary
12 judgment to be entered against MJD in the amount of \$39.75 to resolve
13 Haley's claim. A copy of the proposed order is CP 184-85. Service of this
14 pleading was a restatement of the prior settlement offer and also complies
15 with RCW 4.84.280. This pleading was not provided to the arbitrator who
16 was the trier of fact as required by RCW 4.84.280.

17 MJD declined Haley's offer to resolve Haley's claim with a judgment
18 for \$39.75 and, on August 2, 2013, opposed in court entry of Haley's
19 proposed judgment for \$39.75. CP 179.

20 Having received from the arbitrator an award of \$99, which is more
21 than double Haley's settlement offer and more than double the amount that
22 Haley asked the superior court to award on summary judgment (which was a

1 restatement of the same settlement offer), it is indisputable that Haley
2 prevailed on his claim. He is therefore entitled to an award of fees under
3 RCW 4.84.250.

4 The purpose of cost shifting and fee shifting rules is to encourage
5 settlement by shifting costs and fees to the party that takes the least
6 reasonable position. Haley gave the opposing party an offer to resolve
7 Haley's claim by agreeing to entry of a judgment for less than half of the
8 amount Haley was eventually awarded. Haley did not condition the offer on
9 also settling the opposing party's claim. This matter would have gone to
10 arbitration on only the opposing party's claim if Haley's offer had been
11 accepted.

12 All the attorney efforts on both sides incurred to litigate Haley's claim
13 from that point forward, and the time for the arbitrator and the courts, would
14 have been avoided if the opposing party had accepted Haley's offer, which
15 Haley made more than four months before the date of the arbitration. Under
16 the fee shifting statute, Haley is entitled to recover his fees on this claim.

17 **Haley is entitled to an award of costs because**
18 **he prevailed on his counter claim which was unrelated to MJD's claim.**

19 Having prevailed on his claim, Haley should be entitled to an award
20 of his \$240 filing fee cost under RCW 4.84.010 which provides: "there shall
21 be allowed to the prevailing party" "certain sums for the prevailing party's
22 expenses".

1 a smaller claim in a proceeding where a larger claim cannot also be settled. It
2 is better to settle some claims than none.

3 MJD argued that only one party is entitled to be designated a
4 prevailing party, not both parties. However, the cases that MJD cited in
5 support of this proposition are all cases involving compulsory counterclaims
6 under CR13(a) because those counterclaims arose arise out of the transaction
7 or occurrence that was the subject matter of the plaintiff's claim. In those
8 cases, the successful counterclaim simply reduced the amount of the
9 plaintiff's claim but the plaintiff still obtained a net award. Thus, in those
10 cases, only the plaintiff substantially prevailed.

11 Furthermore, even in cases like those cited by MJD where there are
12 multiple distinct but related claims, the trial court below did not apply the
13 proper approach. The proper approach is a "proportionality approach" which
14 awards the plaintiff costs and fees for the claims it prevails upon, and
15 likewise awards costs and fees to the defendant for the claims it prevails
16 upon. This approach maintains incentives to settle all claims. The two
17 awards are then offset. *Marassi v. Lau, et al.*, 71 Wn. App. 912, 917 (1993).

18 In this case, MJD was awarded all of its costs and Haley was awarded
19 none. Under *Marassi v. Lau*, the trial court should also have awarded to
20 Haley the amounts of his costs and fees and then offset the two awards
21 against each other.

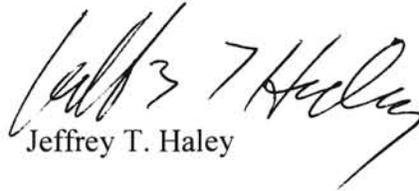
1 **Conclusion and request for fees and expenses on appeal**

2 This matter should be remanded with directions to award to Haley
3 appropriate costs and fees as a prevailing party. As this appeal was necessary
4 to obtain a proper award of fees below, fees and expenses on appeal should
5 also be awarded to Haley.

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7 Dated this 19th day of September, 2014

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Jeffrey T. Haley

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STATE OF ALABAMA

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3 COURT OF APPEALS,
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5 OF THE STATE OF WASHINGTON
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8 Jeffrey HALEY, Appellant,
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13 No. 71691-3-1

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18 I certify that, on 9-19-14, I served a copy of this document on:

19 Frank R Siderius, counsel for Respondent

20 by e-mail of a pdf as agreed.
21

22 DATED this 19th day of September, 2014



23 Jeffrey Haley, *pro se*
24

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